

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**BURLINGTON NORTHERN and
SANTA FE RAILWAY CO.,**

Plaintiff,

v.

Case No. 03-2065-JWL

COSCO NORTH AMERICA, INC.,

Defendant/Third Party Plaintiff,

v.

**NIPPON EXPRESS and TINPLATE
PARTNERS INTERNATIONAL, INC.,**

Third Party Defendants.

MEMORANDUM & ORDER

This action arises out of a train derailment that occurred in Wyandotte County, Kansas on January 14, 2001. Plaintiff Burlington Northern and Santa Fe Railroad Company filed a state court action alleging that defendant Cosco North America, Inc. negligently caused the derailment of its train, resulting in damage to its property. Cosco removed the case to federal court and filed an answer and a third-party complaint alleging that third-party defendants Nippon Express and Tinplate Partners International, Inc. failed to properly load Cosco's containers onto the train, which caused or contributed to the derailment.

This matter is currently before the court on third-party defendant Nippon Express's motion to dismiss. It argues that the two claims in the third-party complaint, which was filed

on March 3, 2003, are grounded in tort law and are therefore barred by the applicable two- year statute of limitations. Cosco does not dispute that if its claims are characterized as sounding in tort law the statute of limitations has run; instead, it contends that its claims rest on contract law and were thus filed within the applicable statute of limitations period. Nippon Express does not contest that if the claims are grounded in contract law the statute of limitations has not run. As a result, the sole issue is whether Cosco's two claims can be characterized as contract-based claims. If they can, it is undisputed that the statute of limitations has not run. If, however, they can only be construed as sounding in tort law, then it is uncontested that the statute of limitations has run and the tort-based claims should be dismissed.

Because the court concludes that Cosco's first claim is properly construed as a breach of contract claim but the second claim cannot be construed as a contract-based claim, the motion to dismiss is denied as to Cosco's first claim but is granted as to the second claim.

BACKGROUND

Cosco's third-party complaint alleges in pertinent part:

8. COSCONA and/or its principal entered into separate agreements with Third-party Defendants for the carriage of cargo. The cargo was to be loaded and stowed and sealed by Third-Party Defendants in containers provided by COSCONA and/or its principal.
9. The containers provided by COSCONA and/or its principal were provided to Third-Party Defendants in good order and condition and were suitable for transportation.
10. Third-Party Defendants failed to properly load the containers.

COUNT I

11. As a result of Third-Party Defendants' improper loading of the containers, the containers themselves were damaged in the alleged derailment, causing damages to COSCONA in the amount of approximately \$5,000.

COUNT II

12. Any damage or loss suffered by Plaintiff as alleged in the Petition, which is denied, was caused or contributed to by the fault, neglect, act, or omission of Third-Party Defendants, their agents or representatives, jointly and severally, and/or plaintiff, and occurred without any fault, negligence, act or omission of Defendant/Third-Party Plaintiff COSCONA, its agents or representatives.
13. If any liability is imposed by COSCONA by reason of the allegations in the Plaintiff's petition, COSCONA is entitled to indemnity in full and/or contribution by Third-party Defendants, jointly and severally, in the amount of the judgment against COSCONA.

Based on these allegations, Nippon Express argues that the claims should be dismissed because they can only be read as tort-based claims and the applicable two-year statute of limitations on such claims has run.

MOTION TO DISMISS STANDARD

The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his [or her] claims which would entitle him [or her] to relief," *Poole v. County of Otero*, 271 F.3d 955, 957 (10th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Smith v. Plati*, 258 F.3d 1167, 1174

(10th Cir. 2001). The issue in resolving a motion such as this is “not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

DISCUSSION

A. Claim I - Breach of Contract or Negligence?

Based on the allegations in Cosco’s third-party complaint, Nippon Express argues that the first claim must be read as a negligence claim that is barred by the two-year statute of limitations for tort claims in Kansas. Cosco disputes this characterization, contending that the claim can be read as sounding in both tort and contract. Thus, according to Cosco, because the claim can be characterized as a breach of contract claim, the statute of limitations has not run and the claim should not be dismissed.

Whether the nature of a claim sounds in tort or contract is “determined from the pleadings . . . and from the real nature and substance of the facts therein alleged.” *Bonin v. Vannaman*, 261 Kan. 199, 208, 929 P.2d 754 (1996). Under Kansas law, the test for determining whether a claim falls under tort law or contract law is as follows:

When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a contract for services which places the parties in such a relationship to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which

incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself.

Malone v. University of Kansas Med. Ctr., 220 Kan. 371, 375-76, 552 P.2d 885 (1976) (citation omitted). Accordingly, Kansas courts have consistently held that “the difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising or imposed by agreement; whereas, a tort is a violation of a duty imposed by law.” *Tamarac Dev. Co. v. Delamater, Freund & Assocs., P.A.*, 234 Kan. 618, 619-20, 675 P.2d 361 (1984); accord *Hunt v. KMG Main Hurdman*, 17 Kan. App.2d 418, 423, 839 P.2d 45 (1992). While elements of both tort and contract may be present in a given case, the key difference is whether the contract calls for “a specific result.” *Hunt*, 17 Kan. App. 2d at 423, 839 P.2d 45 (citing *Tamarac Dev. Co.*, 234 Kan. at 621, 675 P.2d 361).

In this action, Cosco’s third-party complaint alleges that it contracted with Nippon Express (and Tinplate Partners) for the carriage of cargo. The cargo was to be loaded in containers provided by Cosco and/or its principal. Cosco provided the containers “in good order and condition” suitable for transportation. Nippon Express (and Tinplate Partners) failed to properly load the containers. Because the containers were not loaded properly, the containers themselves were damaged in the alleged derailment, causing damages to Cosco in the amount of approximately \$5,000. Based on these allegations, the court concludes that Cosco has stated a claim for breach of contract. Cosco alleges that Nippon Express failed to perform its obligations under the contract. More specifically, it has alleged that Nippon Express breached the specific terms of the contract, apart from any reference to any legal

duties imposed by law. Thus, Cosco has stated a claim sounding in contract law, and the claim was filed within the applicable statute of limitations for contract claims. Nippon Express's motion to dismiss this claim is therefore denied.

B. Claim II - Implied Contractual Indemnity or Comparative Implied Indemnity?

Nippon Express next argues that based on Cosco's allegations, the second claim can only be read as a comparative implied indemnity claim. Cosco disputes this characterization, arguing that the claim can be read as an implied contractual indemnity claim that is grounded in contract law. The parties do not dispute that the statute of limitations for a comparative implied indemnity claim is two years while it is three years for an implied contractual indemnity claim. Thus, the court must determine whether Cosco's allegations state a claim for implied contractual indemnity.

Under Kansas law, there are two types of contractual indemnification, express and implied. *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192, 199 (1983). The former stems from an express contract of indemnity, such as a "hold harmless" agreement. *Id.* The latter arises "when one party without fault is compelled to pay for the tortious acts of another." *Bick v. Peat Marwick & Main*, 14 Kan. App. 2d 699, 799 P.2d 94, 102 (1990) (citing *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192, 199 (1983); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788, 803 (1980)). The claim is typically applied where a principal or employer is obligated, pursuant to the doctrine of respondeat

superior, to pay a third party for the negligent acts of an agent or employee. *Nolde v. Hamm Asphalt, Inc.*, 202 F. Supp. 2d 1257, 1269 (D. Kan. 2002) (citing *Kennedy*, 228 Kan. 439, 618 P.2d at 799-800); *see also United States Fidelity & Guaranty Co. v. Sulco, Inc.*, 939 F. Supp. 820 (D. Kan. 1996)(citing 42 C.J.S. *Indemnity* § 31-32 and *Kennedy*, 228 Kan. 439, 618 P.2d at 799-800). Under Kansas law, however, an entity that employs an independent contractor, as compared to its own agent, is generally not vicariously liable for the negligent acts of the contractor. *Mitzner v. State*, 257 Kan. 258, 891 P.2d 435, 438 (1995) (recognizing rule of no vicarious liability); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104, 1112 (1991)(defining independent contractor and recognizing “right-of-control” test).¹ The entity employs an independent contractor when it “lets out work to another and reserves no control over the work or workmen.” *Falls*, 249 Kan. 54, 815 P.2d at 1109.

In this action, the court concludes that Cosco’s allegations fail to state an implied contractual indemnification claim.² While Cosco pleads that the alleged derailment occurred without “any fault, negligence, act or omission of [it],” it does not allege that there was a relationship – such as principal and agent – that would cause it to be vicariously liable for Nippon Express’s actions. The only allegation relating to its relationship with Nippon Express states that the two parties entered into an agreement for the carriage of cargo. As a result,

¹ An exception to this rule is where an entity employs an independent contractor to do work that is inherently dangerous. *Falls*, 249 Kan. 54, 815 P.2d at 1109. Cosco, however, does not allege that the work Nippon Express contracted to do was inherently dangerous.

² Cosco does not allege that there was an express contract for indemnity; thus, express contractual indemnity also does not apply.

Cosco's allegations fail to state an implied contractual indemnity claim, and the court therefore grants Nippon Express's motion to dismiss this claim.

IT IS THEREFORE ORDERED BY THE COURT THAT third-party defendant Nippon Express's motion to dismiss (Doc. 9) is granted in part and denied in part. It is denied as to the first claim, which the court construes as a breach of contract claim that was filed within the applicable statute of limitations, and granted as to the second claim, which the court concludes can only be construed as a tort-based claim that was not filed within the applicable two-year statute of limitations period.

IT IS SO ORDERED this 15th day of July, 2003.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge